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No. 99-1848

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In the
Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is the "catalyst theory" available for the recovery of attorney's fees under federal fee-shifting statutes?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTERESTS OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE "CATALYST THEORY" IS FUNDAMENTALLY UNFAIR 5

A. Voluntary Change of Behavior Is Not a Concession 6

B. The "Catalyst Theory" Compounds the Inequity in the Enforcement of the Fee-Shifting Statutes 8

C. The "Catalyst Theory" Does Not Fairly Balance the Rights of the Parties 9

II. THE "CATALYST THEORY" IS BAD PUBLIC POLICY 10

A. A Voluntary Change in Behavior Catalyzed by Litigation May Itself Be Illegal 10

B. The "Catalyst Theory" Engenders Confusion and Unnecessary Litigation 12

C. The "Catalyst Theory" Discourages Voluntary Action 14

III. THE "PREVAILING PARTY" STANDARD OF *FARRAR* IS SUFFICIENT TO DETER MOST VIOLATIONS 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 2000 U.S. App. LEXIS 720 (4th Cir. 2000) (unpublished) 2

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978) 8

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 17-18

Farrar v. Hobby, 506 U.S. 103 (1992) ..... *passim*

Gwaltney v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 15

Mooney v. Holohan, 294 U.S. 103 (1935) 6

Morris v. City of West Palm Beach, 194 F.3d 1203 (11th Cir. 1999) 5

National Mining Association v. United States Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998) 11

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656 (1993) 17

Parham v. Southwestern Bell Telephone Company, 433 F.2d 421 (8th Cir. 1970) 4-5

Rochin v. California, 342 U.S. 165 (1952) 6

TABLE OF AUTHORITIES—Continued

Page

S-1 and S-2 v. The State Board of Education of North Carolina, 6 F.3d 160 (4th Cir. 1993) 12-14

United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199 (1968) 17

United States v. W. T. Grant Co., 345 U.S. 629 (1953) 17-18

United States Constitution

U.S. Const. Art. III 16

Statutes

42 U.S.C. § 1988 6

§§ 3601, *et seq.* 2

§ 3613(c)(2) 4

§§ 12101, *et seq.* 2

§ 12205 4

Rules of the Supreme Court

Supreme Court Rule 37 1

37.6 1

Miscellaneous

Gregory C. Sisk, *The Essentials of the Equal Access To Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217 (1994) 13

H.R. No. 1558, 94th Cong., 2d Sess. at 7 (1976) 7

TABLE OF AUTHORITIES—Continued

Page

Joel H. Trotter, *The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 Va. L. Rev. 1429 (1994) 8, 16-19

S. Rep. No. 1011, 94th Cong., 2d Sess. at 5 (1976) 7

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37,[1] Pacific Legal Foundation (PLF) respectfully submits this Brief Amicus Curiae in Support of Respondents, West Virginia Department of Health and Human Resources, *et al.* Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated to litigate important matters of public interest. PLF has thousands of supporters nationwide and advocates a balanced approach to dealing with public interest issues. PLF supports the concept of limited government and believes public policies should reflect a careful assessment of the social and economic costs and benefits involved. Governmental action, including the application of prudential standards in the courts, should be fair and evenhanded.

This case requires this Court to address whether the "catalyst theory" of fee awards, created by the lower courts, is viable under Supreme Court precedent. This is an issue of great public import because that theory requires public and private defendants to pay substantial attorney's fees without a determination of the merits of the lawsuit or an enforceable order. This Court's determination will either encourage or discourage voluntary settlement of significant cases under federal civil rights and environmental laws. PLF litigates such cases and will be directly affected by this determination. A consideration of a broad spectrum of perspectives, including those of the Pacific Legal Foundation, is, therefore, warranted.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Pacific Legal Foundation states that no counsel for a party to this action authored any portion of this brief and that no person or entity, other than Amicus, made a monetary contribution to the preparation or submission of this brief.

PLF has a long history of amicus participation in this Court and believes its public policy perspective on this issue will provide a helpful and necessary viewpoint in this case.

STATEMENT OF THE CASE

Buckhannon Board and Care Home, Inc., operates a care home for elderly people requiring assistance in their daily living. The home failed a fire inspection because it housed residents incapable of self-preservation, in violation of West Virginia law. Buckhannon brought an action for declaratory relief, arguing the law violated the federal Fair Housing Amendments Act (FHAA), 42 U.S.C. §§ 3601, *et seq.*, and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, *et seq*. While the action was pending, West Virginia changed the state law to delete the self-preservation requirement. This change in state law mooted the case.

Although the law was not changed through an enforceable order, Buckhannon claimed it was entitled to attorney's fees as a "prevailing party" under the so-called "catalyst theory." Under that theory, Buckhannon argues, "it obtained the relief it sought through the defendants' voluntary conduct because it filed this action and brought to the state's attention the flaws in the law" and so should be deemed a "prevailing party." *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 2000 U.S. App. LEXIS 720 (4th Cir. 2000) (unpublished).

The Fourth Circuit held, under circuit and Supreme Court precedent, that to qualify as a "prevailing party," the plaintiff must, through the litigation, "obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement." *Id.* Arguing a conflict among the circuits, Buckhannon petitioned the Supreme Court to consider whether the "catalyst theory" is viable. This Court granted review.

SUMMARY OF THE ARGUMENT

It is fundamentally unfair to require a party to pay substantial attorney's fees without any showing of wrongdoing or legal obligation. A voluntary change of behavior is not a concession of guilt as the so-called "catalyst theory" implies. A defendant may change his behavior for many reasons, not all related to the merits of the lawsuit, including simple generosity. In such cases, there is no reason in fairness and justice why the defendant should pay fees and costs to the plaintiff who has yet to prove his case. It is neither fair nor just to require the payment of attorney's fees for voluntary cessation of a legal practice.

The expansive, court-created "catalyst theory" unduly favors plaintiffs. That theory requires a defendant, who voluntarily complies, to pay hefty fees and give up his right to continue a potentially legal practice while the plaintiff gives up nothing and enjoys the windfall of the court's largess at the expense of the defendant. Such unfair treatment in the courts defies all sense of fair play and decency and should not be allowed.

The "catalyst theory" is bad public policy. In some cases, changes in conduct induced by litigation may not only be legally unnecessary but contrary to the law, as demonstrated by citizen suits filed under the Clean Water Act. Additionally, the "catalyst theory" causes confusion and prolongs litigation as courts are required to determine whether a change of conduct was favorable to the plaintiff and induced by the lawsuit or something else. Instead of providing a clear standard for the award of attorney's fees, the "catalyst theory" requires the lower courts to tread a tenuous path of causation to determine if the plaintiff prevailed. A legislative change, as occurred in this case, is particularly troubling because the reasons for the change are sure to be more political than legal. Thus, the "catalyst theory" unduly burdens the courts and introduces unnecessary

uncertainty into the litigation process. Moreover, the theory discourages voluntary compliance as defendants come to fear that their change of conduct may result in a fee award. As a deterrent to voluntary conduct, the "catalyst theory" may do more public harm than good.

In contrast to the "catalyst theory," the requirement this Court established in *Farrar v. Hobby* for prevailing party status is clear and certain. Plaintiffs who meet the *Farrar* standard and become entitled to "enforce a judgment, consent decree, or settlement" will qualify for attorney's fees, but not in a manner designed to penalize voluntary defendants. A plaintiff who obtains an enforceable order is clearly more deserving of an award of attorney's fees than one who merely induced a change of conduct. In addition, the *Farrar* standard does not deter the plaintiff from vindicating a right but it does allow the courts to prevent defendants from systematically avoiding fee liability by changing their practices. Therefore, this Court should reject the "catalyst theory" in favor of an enforceable judgment, consent decree, or settlement.

ARGUMENT

The FHAA and ADA, under which this case was brought, both provide:

> [T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.

42 U.S.C. § 3613(c)(2) and 42 U.S.C. § 12205.

In Petitioners' view, the "catalyst theory" dictates that a party becomes a "prevailing party" when the party merely "achieves a favorable result from the lawsuit." Petitioner's Brief (Pet. Brief) at 37. That theory was created by the Eighth Circuit in *Parham v. Southwestern Bell Telephone Company*, 433 F.2d 421 (8th Cir. 1970), to get around the plain language of a fee-shifting statute. Notwithstanding the civil rights case

was dismissed and the plaintiff received no monetary judgment or other judicial relief, the court held:

> Although we find no injunction warranted here, we believe Parham's lawsuit acted as a catalyst which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII. In this sense, Parham performed a valuable public service in bringing this action. Having prevailed in his contentions of racial discrimination . . . Parham is entitled to reasonable attorney's fees.

Id. at 429-30.

But this Court has never "affirmatively upheld the application of the catalyst test." *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999). In fact, the more recent decisions of this Court are inconsistent with the "catalyst theory." For example, in *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court adopted a higher standard for attorney's fees awards and held that a "prevailing party" is one who "becomes entitled to enforce a judgment, consent decree, or settlement." *Id.* at 574. This ruling would seem to preclude the "catalyst theory." But even if that were not the intent of the *Farrar* decision, as Petitioners suggest, this Court should reject the "catalyst theory" as against public policy.

I

THE "CATALYST THEORY" IS FUNDAMENTALLY UNFAIR

It is fundamentally unfair to require a party to pay attorney's fees when that party has no established legal obligation whatsoever to meet the plaintiff's demands in a lawsuit. But this is what the court-created "catalyst theory" requires—a defendant that changes his conduct voluntarily,

before a final judgment, must pay fees and costs without proof of wrongdoing. Thus, that test penalizes innocent parties and violates "the fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), and which define "the community's sense of fair play and decency," *Rochin v. California*, 342 U.S. 165, 173 (1952). Therefore, the "catalyst theory" should be rejected.

A. Voluntary Change of Behavior Is Not a Concession

The reasons defendants may have for changing their behavior in response to a lawsuit are varied and do not imply that the suit has merit or that the defendant is guilty of wrongdoing. For example, a defendant may choose to accede to the demands of the plaintiff because the defendant does not want the public scrutiny the case may bring; or the cost of litigation may be too high, even if the defendant wins the case; or a court battle may cause undue stress; or the time and effort of defending the case may hamper the defendant's ability to accomplish other objectives; or the defendant may wish to avoid the "taint of litigation." The defendant may even concede the case out of pure generosity.

In such cases, there is no reason in fairness and justice why the defendant should pay attorney's fees to the plaintiff. But the "catalyst theory" dictates such a result. So long as the plaintiff achieves a favorable change of behavior, Petitioners argue, the plaintiff is entitled to fees and costs.

However, the "catalyst theory" is based on a false assumption–that the defendant has acted illegally, whereas the defendant has only been accused of wrongdoing. Petitioners claim the legislative history of the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988, supports the use of the "catalyst theory." Pet. Brief at 33. But, that history simply demonstrates a bias in some legislators, and cynically adopted by some

courts, that a defendant in a civil rights suit has acted unconstitutionally without any actual showing of illegal conduct.

> [F]or purposes of the award of counsel fees, parties may be considered to have prevailed *when they vindicate rights* through a consent judgment or without formally obtaining relief.

S. Rep. No. 1011, 94th Cong., 2d Sess. at 5 (1976) (emphasis added).

If there is no formal relief, there has been no decision on the merits. Without a decision on the merits, there can be no assurance the defendant's conduct is contrary to the law. Thus, the defendant may have had no obligation to change the challenged action although the defendant chooses to settle the case. How can the plaintiff vindicate a right that may never have been violated?

> Similarly, after a complaint is filed a defendant might *voluntarily cease the unlawful practice*. A court might still . . . conclude, as a matter of equity that no formal relief, such as an injunction, is needed.

H.R. No. 1558, 94th Cong., 2d Sess. at 7 (1976) (emphasis added).

The statement, "voluntarily cease the unlawful practice," necessarily assumes the conduct of the defendant was illegal. But in this case and others, predicated on the "catalyst theory," there is no finding of illegality. Until the defendant becomes subject to an enforceable judgment, consent decree, or settlement, the defendant may have no recognized legal duty toward the plaintiff whatsoever.

If the defendant voluntarily ceases a *lawful* practice (which must be assumed until proven otherwise), it would be a travesty

to require the defendant to pay fees and costs. This would be a windfall to the plaintiff (surely not intended by Congress) and violate all notions of "fair play and decency." If the purpose of fee-shifting is to encourage the vindication of civil rights, as Petitioners maintain, the "catalyst theory" makes no sense. In fact, it undermines the civil rights of the defendant. A change of behavior on the part of the defendant is not a concession of guilt or wrongdoing. Therefore, it would be fundamentally unfair to require the defendant to pay fees and costs on the mere accusation of illegal conduct.

B. The "Catalyst Theory" Compounds the Inequity in the Enforcement of the Fee-Shifting Statutes

It is a matter of record that the courts do not normally grant attorney's fees to prevailing defendants under the fee-shifting statutes. This is particularly true for civil rights cases. *See* Joel H. Trotter, *The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 Va. L. Rev. 1429, 1436 (1994).

Although the language of the attorney's fees provisions of such statutes as the FHAA and ADA is neutral on its face, the defendant is virtually never accorded the same right to fees and costs as the plaintiff. In fact, contrary to the plain meaning of the acts, the courts have erected a significant barrier to the award of attorney's fees to prevailing defendants. Often, a prevailing defendant may only recover fees if the underlying action is deemed frivolous or wholly without merit. *See Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978) (acknowledging a double standard in fee awards). This double standard for awarding attorney's fees is unfair enough—as well as uncalled for given the neutral language of the statutes—but the unfairness is compounded by the overly expansive standard applied to prevailing plaintiffs under the "catalyst theory." As noted above, the "catalyst theory" holds a defendant liable to the

plaintiff for fees and costs even when the defendant's change in conduct is wholly gratuitous.

But it adds insult to injury that a defendant is all but certain not to recover the costs of litigation even after a court has determined that the defendant did not violate any law or interfere with the rights of the plaintiff. It passes understanding to say that such blatantly unfair treatment of an innocent party can be squared with "fundamental conceptions of justice." Surely, any requirement that so dramatically favors plaintiffs, like the "catalyst theory" of fee awards, must violate our "community sense of fair play and decency" and should not be countenanced.

C. The "Catalyst Theory" Does Not Fairly Balance the Rights of the Parties

Another fact attesting to the fundamental unfairness of the "catalyst theory" is the unequal exchange that occurs when a defendant voluntarily complies with the demands of the plaintiff in a lawsuit. A defendant may voluntarily change his conduct, as established above, for varied reasons, many of which do not go to the merits of the case. In fact, before a judicial determination of the case is made, at the point where the "catalyst theory" comes into play, the defendant may have no legal obligation whatsoever to change the contested behavior. So, when the defendant voluntarily modifies the challenged conduct, the defendant gives up the right (often forever) to continue offending behavior, even if the conduct were legal in all respects.

But, under the "catalyst theory," the plaintiff gives up nothing in exchange. To the contrary, the plaintiff is entitled to attorney's fees and costs upon the defendant's voluntary compliance just as if the plaintiff had won a favorable judgment on the merits of the suit. This is fundamentally unfair. Why should a defendant have to give up a legal right and pay fees as well?

A more balanced approach would require both sides to give something up to avoid unnecessary or prolonged litigation. Since the defendant gives up a right to continue what may be perfectly legal conduct, it is only fair that the plaintiff forego something in return; namely, the award of attorney's fees. After all, the plaintiff has not won the case or otherwise established an entitlement to have the challenged conduct changed.

Against the defendant, the "catalyst theory" is clearly punitive. This may not offend one's "sense of fair play" if the defendant is presumed to have acted illegally, but no such presumption is warranted. The presumption of guilt without proof is incompatible with the concept of ordered liberty, which the Constitution was designed to ensure, and unacceptable in our democratic society. Nevertheless the "catalyst theory" implies such a presumption. How else could the courts justify imposing a fee award against an innocent party?

The "catalyst theory" simply does not square with any reasonable "conceptions of justice" nor accord with a modern "sense of fair play and decency." It imposes a monetary obligation on a defendant to pay attorney's fees to a plaintiff without any showing of actual wrongdoing—even when the defendant acts against his own interests by voluntarily changing his conduct. Therefore, this Court should adhere to the fee-award standard enunciated in *Farrar* that a prevailing party is only one who "becomes entitled to enforce a judgment, consent decree, or settlement." 506 U.S. at 574.

II

THE "CATALYST THEORY" IS BAD PUBLIC POLICY

A. A Voluntary Change in Behavior Catalyzed by Litigation May Itself Be Illegal

In some cases, a suit may induce, rather than deter, illegal conduct and still require the defendant to pay fees and costs to

the plaintiff under the "catalyst theory." The facts in *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), are instructive. Under Section 404 of the Clean Water Act, the Army Corps of Engineers may issue permits for the discharge of dredged or fill material into the navigable waters of the United States.

> In 1986 the Corps issued a regulation defining the term "discharge of dredged material," as used in § 404, to mean "any addition of dredged material into the waters of the United States," but expressly excluding "*de minimis*, incidental soil movement occurring during normal dredging operations." 51 Fed. Reg. 41,206, 41,232 (Nov. 13, 1986). In 1993, responding to litigation, the Corps issued a new rule removing the *de minimis* exception and expanding the definition of discharge to cover "any addition of dredged material into, *including any redeposit of dredged material within*, the waters of the United States."

Id. at 1401 (emphasis in original).

For almost a decade, the Army Corps of Engineers had maintained that it was prohibited by the Clean Water Act from regulating "de minimis incidental soil movement." But after the Corps was sued by numerous environmental organizations for not regulating small redeposits of soil, the Corps sought to comply with the plaintiff's demand and voluntarily agreed to regulate the very activity it had steadfastly asserted it could not regulate. The revised Corps regulation was challenged in court by various trade associations whose members engage in dredging and excavation. Ultimately, the Court of Appeals for the District of Columbia ruled the Corps had exceeded its authority under the Clean Water Act and invalidated the revised rule. *See National Mining Association*, 145 F.3d 1399.

That case illustrates the absurdity of the "catalyst theory." In response to a lawsuit a defendant may choose to comply with the plaintiff's demands, but that compliance may not be required or even allowed by law. How can the courts justify awarding attorney's fees to a plaintiff who has induced conduct that is either not required by law or itself illegal?

B. The "Catalyst Theory" Engenders Confusion and Unnecessary Litigation

The virtue of the "prevailing party" definition given by this Court in *Farrar* is clarity and certainty. In that case, this Court held that a party prevails only when the party "becomes entitled to enforce a judgment, consent decree, or settlement." 506 U.S. 574. These are discreet, easily identified conclusions to the litigation process. In contrast, however, the expansive "catalyst theory" raises more questions than it answers and requires further litigation to determine whether the change of conduct was favorable to the plaintiff and was induced by the lawsuit or some other factor.

> Too frequently, legal battles over attorneys' fees merely add another round of protracted litigation to what already has been protracted litigation on the merits of a claim . . . . This collateral litigation over attorneys' fees is often more heated, more arcane, and over far higher monetary stakes than the underlying lawsuit. The relationship of all of this activity to the larger public good is becoming increasingly difficult to discern. Farrar's crucial insights are that the refuge from such litigation lies in a clearly established rule for fee recovery and that the catalyst-based approach to fee applications has left us utterly at sea.

S-1 and S-2 v. The State Board of Education of North Carolina, 6 F.3d 160, 171 (4th Cir. 1993) (Judge Wilkinson dissenting opinion later adopted by en banc court on rehearing).

Instead of providing a clear standard for determining the award of attorney's fees, the "catalyst theory" requires the lower courts to follow a gossamer thread of purported causation to determine if a party has prevailed. A change in course dictated by a legislative body, as in this case, is particularly troubling because the reasons for the change are likely to be more political than legal. Legislators may change a law that moots a case not because the original enactment was indefensible but because they may wish to show they are not petty or to demonstrate their largess, or even to curry favor with the electorate.

> Except in rare circumstances, it would seem presumptuous indeed for a party litigating a case pending in the courts to contend that his or her initiation of a lawsuit compelled [the Legislature] to enact new legislation for his benefit. As the United States Court of Appeals for the Fifth Circuit stated in *Milton v. Shalala*, "[t]he mere possibility that [the Legislature] acted because of an individual claimant's suit (or reacted to a large number of similar suits) is too speculative in our view considering the many influences upon members of [the Legislature] in casting votes."

Gregory C. Sisk, *The Essentials of the Equal Access To Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217, 285-86 (1994).

Thus, the "catalyst theory" unduly burdens the courts and introduces unnecessary uncertainty into the litigation process. In addition, the "catalyst theory" encourages questionable cases.

> [The] catalyst theory provides incentives for filing marginal, even frivolous, lawsuits. Any change in conduct by the defendant, for whatever reason, may offer a promising payout to attorneys who file a

> complaint, whether or not that complaint has any ultimate legal merit. Section 1988 should not be a license to shake down government officials, nor was it ever intended to be simply "a relief Act for lawyers."

S-1, 6 F.3d at 172.

For this reason, and others, the Court should adopt the standard enunciated in *Farrar*.

C. The "Catalyst Theory" Discourages Voluntary Action

In *S-1 and S-2*, Judge Wilkinson understood that the "catalyst theory" discourages early settlement of a suit because of the continued risk of fees.

> With its reliance on a simple chronology of events to show causation, catalyst theory empowers courts to award fees for any change in behavior that occurs after the filing of a lawsuit, whether or not the court could have ordered that change in conduct. In this way, catalyst theory serves to disable [defendants], who may come to fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorney's fees.

6 F.3d at 172.

Normally, the risk of losing a case and paying out large attorney's fees would discourage a party from prolonging a questionable case in litigation. This is good public policy as it serves as an incentive to voluntary action and reduces the burden on the courts. However, the threat of the "catalyst theory" has the opposite effect. It deters voluntary action that may result in a fee award. As a deterrent to voluntary action, the "catalyst theory" may do more public harm than good. For example, the theory discourages the defendant from voluntarily

giving more than a court could legally demand. A policy to encourage such conduct is at work in the 60-day notice provisions of various federal environmental statutes.

In *Gwaltney v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), this Court considered the purpose of the 60-day notice requirement for citizen suits under the Clean Water Act and determined the notice provision would serve no purpose if the defendant could not avoid a citizen suit for past violations by coming into compliance within the notice period. This Court opined that the possibility of avoiding litigation, including the assessment of civil penalties, may induce a defendant to "take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 61.

But this is a benefit of voluntary compliance that is undermined by the "catalyst theory." That theory discourages early and magnanimous settlement. Therefore, the court-created "catalyst theory" is bad public policy and should be rejected.

III

THE "PREVAILING PARTY" STANDARD OF *FARRAR* IS SUFFICIENT TO DETER MOST VIOLATIONS

In addition to encouraging plaintiffs to vindicate their rights, one of the obvious objectives of the fee-shifting statutes is to deter illegal conduct. But the "catalyst theory" is not required to satisfy these objectives. The *Farrar* standard, along with the mootness doctrine, serves as an adequate deterrent.

Farrar raised the bar on attorney's fees but it did not eliminate the deterrent effect of such awards. Plaintiffs who meet the *Farrar* standard, and obtain an enforceable judgment, consent decree, or settlement still qualify for fees. The threat of

liability for attorney's fees will continue to discourage illegal conduct. Moreover, according to Trotter,

> the incentive for defendants [in a civil rights case] to alter challenged practices before a plaintiff meets Farrar's test should ensure the ultimate legality of institutional behavior. Plaintiffs in those cases would still have a damages claim for the past wrong, and under Farrar, a defendant could not pay damages without rendering the plaintiff a prevailing party.

Trotter, *supra* at 1449.

The question, however, remains whether the "catalyst theory" is necessary to provide an added deterrent given that voluntarily discontinued conduct could be repeated in the future. *Id.* The answer is, "no." While voluntary action may normally moot a case, there is an exception to the mootness doctrine that allows a determination on the merits, notwithstanding the defendant has voluntarily changed his conduct. In appropriate cases, this exception serves as an added deterrent to illegal conduct.

The mootness doctrine operates to ensure that the "cases" and "controversies" requirement of Article III of the Constitution is met and to "avoid advisory opinions on abstract questions of law." *Id.* at 1450. Therefore, to be heard, a plaintiff must have an "ongoing personal stake" in the case. *Id.* at 1450. A lawsuit may become moot if the contested law changes, as in this case, so as to satisfy the plaintiff's claim or render it irrelevant. *Id.* Or, in a suit for injunctive relief, the case may be mooted if the challenged conduct or condition expires before final review. *Id.* Likewise, while the suit is pending, "an opponent may provide full relief, or the parties may dispose of their claims through consent judgment or simple settlement." *Id.*

There is, however, an exception to the mootness doctrine. Under this exception, voluntary cessation of a challenged action may not result in dismissal of the case. Instead, a court may choose to rule on the merits of the case, determine the legality of the practice, and issue an injunction to prevent the defendant from reverting back to the challenged practice. *Id.*

In *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), the government sought to enjoin a defendant from serving simultaneously as a director of competing corporations. When the director resigned, the defendants argued the case was moot and should be dismissed as a matter of right. However, this Court acknowledged the possibility that the director could reverse his resignation, and since the case also raised an important public policy question in antitrust law, the court retained the case to rule on the merits.

Subsequently, this Court stated in *United States v. Concentrated Phosphate Export Assn., Inc.*, that "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 393 U.S. 199, 203 (1968). In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), this Court declared it was "well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.* at 289.

Trotter suggests that more recent case law, such as *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), which was decided after *Farrar*, indicates that the voluntary cessation exception will be available in appropriate cases. In *Associated General Contractors*, this Court applied the exception in circumstances similar to those found in a

"catalyst theory" case. The defendants in that case claimed that a challenge to a city ordinance was moot because the ordinance had been repealed and replaced with a new version. This Court rejected the mootness claim and instead applied the exception for voluntary cessation under *Aladdin's Castle*. Thus,

> [b]y invoking the exception for voluntary cessation, a catalytic plaintiff could satisfy Farrar's test for prevailing party status. Upon full adjudication, the plaintiff could obtain an enforceable judgment. The mere ability to do so should in fact provide ample leverage for obtaining a favorable consent decree or settlement. In either case, the plaintiff would satisfy Farrar and become a prevailing party entitled to attorney's fees, subject to certain limitations.

Trotter, *supra* at 1452-53.

Although a court *may* apply the voluntary cessation exception, it need not do so. In *W.T. Grant*, this Court explained that voluntary cessation was but "one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." 345 U.S. 629, 633. Moreover, *Farrar* itself carries some limitations on the use of the voluntary cessation exception: "Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Farrar*, 506 U.S. at 111. As this Court noted, "an enforceable judgment alone is not always enough." *Id.* at 117. Trotter suggests, for example, that a plaintiff might receive a declaratory judgment that a policy is unconstitutional on its face, but without evidence that the policy had ever been enforced the plaintiff could not show, under *Farrar*, that the judgment provided a real benefit to the plaintiff by changing the behavior of the defendant.

Even with these limitations, however, the *Farrar* standard offers a more balanced approach to fee recovery than the gratuitous "catalyst theory." A plaintiff who obtains a judgment, consent decree, or settlement is infinitely more deserving of an award of attorney's fees than one who merely induced a change in conduct. Although the *Farrar* standard is not as advantageous to plaintiffs as the court-created "catalyst theory," it does, as Trotter suggests, "allow courts to prevent defendants from systematically avoiding fee liability by changing their practices." Trotter, *supra* at 1454. Therefore, this Court should reject the "catalyst theory" of fee recovery.

CONCLUSION

The court-created "catalyst theory" is fundamentally unfair. It requires the payment of attorney's fees without any showing of wrongdoing or legal obligation. Clearly, a voluntary change of behavior is not a concession of guilt or illegality as there are many innocent reasons for a defendant to seek early resolution of a lawsuit, including simple generosity. Therefore, any presumption of wrongdoing under the "catalyst theory" is unwarranted. In addition, application of the "catalyst theory" is bad public policy because it may induce illegal compliance, cause confusion, prolong litigation, and discourage voluntary change of behavior. Contrary to the "catalyst theory" that unduly favors plaintiffs, this Court's fee award requirement in *Farrar* strikes a proper balance between the parties. Under *Farrar*, a plaintiff may recover fees with an enforceable judgment, consent decree, or settlement, and the court can prevent systematic violations of the law.

For the foregoing reasons, this Court should reject the "catalyst theory" in favor of the *Farrar* standard .

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Respectfully submitted,

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